Public Prosecutor v Saare Hama & Anor

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45–3 OF 1999
VINCENT NG J
2 MAY 2001

Criminal Law *— Dangerous drugs — Trafficking — Cannabis — Drugs found hidden in compartment between back seat and audio set — Whether compartment was 'specially constructed compartment' — Whether drugs found concealed in any compartment, specially, constructed for the purpose — Whether s 37(h) of the Dangerous Drugs Act 1952 applicable — Dangerous Drugs Act 1952 ss 37(h) & 38B(1)(a)*

Criminal Law *— Dangerous drugs — Trafficking — Cannabis — Raiding officers acted on tip-off by informer — Car belonged to third party — Whether prosecution ruled out probability that third party had placed drugs into compartment — Whether to draw more favourable inference that both accused did not know of presence of drugs in car — Dangerous Drugs Act 1952 ss 37(h) & 38B(1)(a)*

Criminal Procedure *— Prosecution — Prima facie case — Trafficking in dangerous drugs — Standard of proof applicable at close of prosecution case — Criminal Procedure Code s 180*

Words and Phrases *— Meaning of 'compartment, specially constructed for the purpose' — Dangerous Drugs Act 1952 s 37(h)*

On 23 June 1998, after receiving certain information, police officers from the Narcotic Department tailed a blue Honda Accord car, bearing a Thai registration number ('the car'). The officers approached the car as it stopped at the Jitra toll plaza. The two accused were ordered to alight from the car. According to DSP Yusuh ('PW4'), the accused appeared to be shocked and frightened. PW4 then inquired as to whether they were carrying any incriminating items and they responded by shaking their heads to indicate the negative. Immediately thereafter, the car was examined in the presence of the accused but nothing incriminating was found. Then, with the aid of a 'T' shaped screwdriver, PW4 took out two screws behind the passenger seat, separated a partition and found, hidden between the back seat and the audio set, 48 compressed blocks of plant material suspected to be cannabis. Both the accused were jointly charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in the cannabis, which weighed approximately 48kg. The prosecution had sought, through a technical assistant of Kah Motor Co Sdn Bhd ('PW7'), to prove that the drugs were found concealed in a compartment specially constructed for the purpose in the car, thus triggering s 37(h) of the Act. The defence, on the other hand, asserted that the drugs were found concealed but not in 'any compartment specially constructed'. PW7 examined the car and found, at the back portion of the rear seat, a compartment that was not normally found in other original Honda Accord cars. PW7 explained that a new Honda Accord car sold in Malaysia had an 'X'-shaped

supporting panel behind the rear seat as a normal feature. In the case of the car, the 'X' shaped panel was missing. Under cross-examination by the defence, PW7 admitted that he did not have any experience or knowledge of the back internal configuration of similar Honda Accord cars that were assembled or sold in Thailand. PW7 further agreed with defence counsel that the rear compartment in the car may not be a specially constructed compartment, as its back internal configuration may be representative of the standard features of such cars sold in Thailand. The car was in fact owned by M, who was wanted by the Thai narcotics enforcement officers to assist them in the investigation of certain dangerous drugs offences.

Held, acquitting both the accused at the close of the prosecution case:

(1) The law in respect of the standard of proof applicable at the close of the prosecution case based on the amended s 180 of the Criminal Procedure Code was that, the prosecution could be ruled to have 'made out a prima facie case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole was such that, if unrebutted, was sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen (see p 491G–H).

(2) It was therefore wrong for a judge or magistrate to require the prosecution to prove that the accused was actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial. After the defence was called and should the accused elect to remain silent, call no evidence or cannot come up with any good reason why the earlier conclusion was wrong or point out some inherent weakness in the prosecution case, the case would be said to have been proven beyond reasonable doubt (see pp 491H–492A).

(3) The expression 'compartment, specially constructed for the purpose' used in s 37(h) of the Act meant a compartment specially constructed and designed for a special purpose of concealment of the drugs and such a compartment was either non-existent or not of a similar physical feature, design and space when compared to a similar vehicle that was of the same model. Therefore, to establish that the compartment in the car was 'specially constructed for the purpose', the prosecution would have to adduce evidence from an expert or a person who was entirely familiar with the car and model as the same make as the car in Thailand (see p 493B–C).

(4) In the instant case, the competency of PW7 was in serious doubt as he had admitted that he was only familiar with Honda Accord

cars in Malaysia and did not know the standard internal structure or configuration of the car as it was of Thai origin. Further, PW7 conceded that the compartment in the car could probably not be a specially constructed compartment. As such, it was clear that the presumption under s 37(h) of the Act was inapplicable in the instant case as it was negated by PW7's own admission (see p 493D–E).

(5) No smell was detected or traces of cannabis found in the passenger compartment when the interior of the car was examined. Based on these two features of the prosecution evidence, the court could draw two inferences, firstly, that the drugs had been concealed in the car by either the first accused, the second accused or both of them or secondly, neither of the accused knew of the presence of the drugs in the car as the drugs were concealed and their presence not being apparent to sight or detectable by smell. Since no fingerprints were lifted or finger swabs taken from the accused, the court had no alternative but to apply the trite law that the more favourable of the two inferences should be drawn in favour of the accused (see p 494A–C).

(6) Although details of M's residential address was available, no effort had been made to trace or procure M. Considering the fact that the raiding officers had acted on a tip-off by an informer, who might have been a paid informer, the onus was in the prosecution to rule out the probability that M himself had placed the drugs in the compartment of the car. The prosecution however had failed to rule out such probability (see p 494F–I); *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 followed.

(7) The drugs were taken out from the strong room on 24 June 1998 at 4.05pm for the purpose of putting them in a box ('P1') and sealing P1 with the 'PDRM 384' seal. It was only some 19 hours later, that is, on 25 June 1998 at 11.40am, that P1 was handed to the government chemist. There was no indication as to when P1 was sealed with the 'PDRM 384' seal or where P1 was kept during that period and the court was left to guess and speculate on the same, adversely to the prosecution case. This infirmity was further compounded by the fact that there was a difference of 2.68kg between the weight of the drugs given by two prosecution witnesses. The difference in weight was never explained. Furthermore, the alleged two inch slits on the 48 slabs of drugs mentioned by PW4, PW6 and PW8 was pointedly contradicted by PW2, who said that he did not notice any slits in any of the 48 slabs. These infirmities had led the court to harbour a serious doubt as to whether the drugs actually seized and the drugs subsequently produced before the court were the same (see p 495A–F).

(8) Therefore, after considering all the evidence adduced by the prosecution and the submissions by both sides, the court found

A that the prosecution had not made out a prima facie case (see p 496B).

[**Bahasa Malaysia summary**

B Pada 23 Jun 1998, selepas menerima maklumat tertentu, pegawai polis dari Jabatan Narkotik telah mengekori sebuah kereta Honda Accord biru, yang membawa nombor pendaftaran negara Siam ('kereta tersebut'). Pegawai-pegawai tersebut telah mendekati kereta tersebut apabila ia berhenti di plaza tol Jitra. Dua tertuduh diarahkan supaya turun dari kereta tersebut. Menurut DSP Yusuh ('SP4'), C tertuduh kelihatan terperanjat dan takut. SP4 kemudiannya bertanya sama ada mereka membawa apa-apa benda yang membabitkan kesalahan dan mereka menjawab dengan menggeleng kepala mereka untuk menunjuk tidak. Sejurus kemudian, kereta tersebut telah diperiksa dalam kehadiran tertuduh tetapi tiada apa yang D membabitkan kesalahan telah dijumpai. Kemudiannya, dengan bantuan satu pemutar skru yang berbentuk huruf 'T', SP4 telah mengeluarkan dua skru di belakang tempat duduk penumpang, memisahkan suatu sesekat dan mendapati, tersorok di antara tempat duduk belakang dan set audio, 48 blok bahan tumbuhan termampat yang disyaki adalah kanabis. Kedua-dua tertuduh dipertuduhkan E bersama di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar kanabis, yang beratnya kira-kira 48kg. Pihak pendakwa telah membuat permohonan, menerusi seorang pembantu teknikal Kah Motor Co Sdn Bhd ('SP7'), untuk membuktikan dadah itu dijumpai tersembunyi dalam suatu kompartment ynag dibina secara khas untuk tujuan itu dalam kereta F tersebut, justeru itu mencetuskan s 37(h) Akta tersebut. Pihak pembelaan sebaliknya menegaskan bahawa dadah yang dijumpai tersorok tetapi bukan dalam 'any compartment specially constructed'. SP7 telah memeriksa kereta tersebut dan mendapati, di bahagian belakang tempat duduk belakang, satu kompartment yang tidak G dijumpai dalam kereta Honda Accord asli pada lazimnya. SP7 menjelaskan bahawa sebuah kenderaan Honda Accord baru yang dijual di Malaysia mempunyai satu panel sokongan berbentuk huruf 'X' di hadapan tempat duduk belakang sebagai satu ciri biasa. Dalam kes kereta tersebut, panel berbentuk huruf 'X' tidak dijunpai. Atas pemeriksaan balas oleh pihak pembelaan, SP7 mengaku beliau tidak H mempunyai apa-apa pengalaman atau pengetahuan mengenai susun atur bahagian dalaman belakang kereta Honda Accord yang serupa yang dipasang atau dijual di negara Siam. SP7 seterusnya bersetuju dengan peguam pembela bahawa kompartmen bahagian belakang dalam kereta tersebut mungkin bukan satu kompartmen yang dibina secara khas, oleh kerana susun atur bahagian dalaman belakang I mungkin mewakili ciri-ciri standard kereta demikian yang dijual di negara Siam. Kereta tersebut sebenarnya dimiliki oleh M, yang dikehendaki oleh pegawai-pegawai penguatkuasa narkotik negara

Siam untuk membantu mereka dalam siasatan kesalahan dadah tertentu. A

Diputuskan, membebaskan kedua-dua tertuduh di penghujung kes pihak pendakwaan:

(1) Undang-undang berkenaan dengan beban membukti yang terpakai pada penghujung kes pihak pendakwaan berdasarkan s 180 Kanun Acara Jenayah terpinda adalah bahawa, pihak pendakwaan boleh diputuskan telah 'membuktikan satu kes prima facie terhadap tertuduh' apabila nilai probatif keterangan ke atas segala unsur utama dalam tuduhan diambil secara keseluruhan adalah, sekiranya tidak dibuktikan sebaliknya, mencukupi untuk mendorong mahkamah mempercayai kewujudan fakta-fakta yang berhubung dengan unsur-unsur utama tersebut atau menganggap kewujudannya begitu mungkin hinggakan seorang yang bijak harus bertindak atas andaian bahawa fakta-fakta itu wujud atau memang berlaku (lihat ms 491G–H). B C D

(2) Oleh yang demikian adalah salah untuk seorang hakim atau majistret untuk menghendaki pihak pendakwa membuktikan bahawa tertuduh memang bersalah melampaui keraguan munasabah sebelum memanggil pembelaannya. Keperluan untuk keputusan muktamad mestilah ditangguhkan sehingga penghujung perbicaraan. Selepas pembelaan dipanggil dan sekiranya tertuduh memilih untuk berdiam diri, tidak memanggil keterangan atau tidak dapat memberi sebarang alasan yang elok berkaitan mengapa kesimpulan yang lebih awal adalah salah atau menunjukkan serba sedikit kelemahan sedia ada dalam kes pendakwa, kes akan dikatakan telah dibuktikan melampaui keraguan munasabah (lihat ms 491H–492A). E F

(3) Ungkapan 'compartment, specially constructed for the purpose' yang digunakan dalam s 37(h) Akta tersebut bermakna suatu kompartmen yang dibina secara khas dan dirancang untuk tujuan khas menyorok dadah tersebut dan kompartmen sedemikian tidak wujud atau bukan berupa ciri fizikal, reka bentuk dan ruang serupa apabila dibandingkan dengan kenderaan serupa yang juga model yang sama. Maka, untuk membuktikan bahawa kompartmen kereta tersebut telah 'dibina secara khas untuk tujuan itu', pihak pendakwa seharusnya mengemukakan keterangan daripada seorang pakar atau seseorang yang cukup berpengetahuan tentang kereta dan model yang buatannya sama dengan kereta tersebut di negara Siam (lihat ms 493B–C). G H

(4) Dalam kes ini, kebolehan SP7 diragukan kerana beliau telah mengaku bahawa ia hanya berpengetahuan tentang kereta Honda Accord di Malaysia dan tidak tahu tentang struktur atau susun atur dalaman standard kereta tersebut kerana ia berasal daripada negara Siam. Selanjutnya, SP7 bersetuju bahawa kompartmen I

dalam kereta tersebut mungkin tidak merupakan suatu kompartmen yang dibina secara khas. Dengan itu, adalah jelas bahawa andaian di bawah s 37(h) Akta tersebut tidak terpakai dalam kes ini kerana ia dinafikan oleh pengakuan SP7 sendiri (lihat ms 493D–E).

(5) Tiada bau dikesan atau tanda-tanda kanabis dijumpai dalam kompartmen penumpang apabila bahagian dalam kereta tersebut diperiksa. Berdasarkan dua ciri keterangan pihak pendakwa ini, mahkamah boleh membuat dua inferens, pertama, bahawa dadah tersebut telah disembunyikan dalam kereta tersebut oleh sama ada tertuduh pertama, tertuduh kedua atau kedua-dua mereka atau kedua, tidak salah seorang daripada mereka sedar tentang kehadiran dadah tersebut dalam kereta tersebut oleh kerana dadah tersebut tersorok dan kehadirannya tidak kelihatan serta-merta atau boleh dikesan dengan menghidunya. Oleh kerana tiada cap jari atau spesimen jari diambil daripada tertuduh, mahkamah tiada pilihan melainkan memakai undang-undang mantap bahawa inferens yang lebih menyenangkan harus dibuat memihak kepada tertuduh (lihat ms 494A–C).

(6) Walaupun butir-butir tentang alamat kediaman M boleh didapati, tiada usaha telah dijalankan untuk mencari atau mendapatkan M. Memandangkan hakikat bahawa pegawai-pegawai serbuan telah bertindak atas sedikit maklumat oleh seorang pemberi maklumat, yang mungkinnya seorang pemberi maklumat dibayar, beban terletak pada pihak pendakwa untuk mengenepikan kebarangkalian bahawa M sendiri telah meletakkan dadah tersebut dalam kompartmen kereta tersebut. Namun demikian, pihak pendakwa telah gagal dalam tidak menimbang kemungkinan demikian (lihat ms 494F–I); *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 diikut.

(7) Dadah tersebut telah diambil keluar dari bilik kukuh pada 24 Jun 1998 pada pukul 4.05pm untuk tujuan meletakkannya dalam sebuah kotak ('P1') dan P1 dimeterai dengan meterai 'PDRM 384'. Hanya kira-kira 19 jam kemudian, iaitu, pada 25 Jun 1998 pada pukul 11.40 pagi, barulah P1 diserahkan kepada ahli kimia kerajaan. Tiada apa-apa yang menunjukkan bila P1 dimeteraikan dengan meterai 'PDRM 384' atau di manakah P1 disimpan sewaktu tempoh itu dan mahkamah dibiarkan mengagak dan meramal persoalan yang sama, dengan kesan bertentangan terhadap kes pihak pendakwa. Kelemahan ini selanjutnya berlipat ganda dengan fakta bahawa terdapatnya perbezaan berat sebanyak 2.68kg di antara berat dadah yang diberikan oleh dua saksi pihak pendakwa. Perbezaan dalam berat tidak dijelaskan. Tambahan pula, belahan dua inci yang dikatakan ada pada 48 bidur dadah itu yang disebut oleh SP4, SP6 dan SP8 disangkal dengan penuh makna oleh SP2, yang mengatakan beliau tidak memberi perhatian kepada apa-apa belahan dalam mana-mana 48 bidur itu. Kelemahan-kelemahan ini telah menyebabkan

mahkamah ragu-ragu mengenai sama ada dadah yang sebenarnya dirampas dan dadah yang kemudiannya dikemukakan di mahkamah adalah sama (lihat ms 495A–F).

(8) Maka, selepas menimbang semua keterangan yang dikemukakan oleh pihak pendakwa dan hujah-hujah dari dua belah pihak, mahkamah mendapati bahawa pihak pendakwa tidak berjaya membuktikan kes prima facie (lihat ms 496B).]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 367–376.

For cases on prima facie case, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2258–2260.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
Arulpragasan Sandaraju v PP [1997] 1 MLJ 1, 389 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Kumaraguru a/l N Muniandy & Ors v PP [1994] 1 MLJ 254 (refd)
Pavone v PP [1984] 1 MLJ 77 (refd)
PP v Chin Yoke [1940] MLJ 47 (refd)
PP v Mohan Singh Lachman Singh [1999] 4 CLJ 629 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
PP v Saat bin Mat Takraw & Anor [1998] 3 MLJ 784 (refd)
PP v Saimin & Ors [1971] 2 MLJ (refd)
PP v Saw Kok Leong [1993] 1 CLJ 83 (refd)
PP v Sukumaran Sundram [1999] 4 CLJ 242 (refd)
Wong Chooi v PP [1967] 2 MLJ 180 (refd)

Legislation referred to

Criminal Procedure Code ss 180(i), 182A(i)
Dangerous Drugs Act 1952 s 37(h)

Wan Norzanuar bte Wan Ahmad (Deputy Public Prosecutor) for the prosecution.

Ranjit Singh Dhillon (*Naran Singh* with him) (*R Rajasingam & Co*) for the first accused.

Yaacob bin Hj Othman (*Ismayatim, Yaacob & Associates*) for the second accused.

Vincent Ng J. : On 23 June 1998, at about 9am, after receiving certain information, DSP Yusuh bin Mat Taib ('PW4') left the Narcotic Department IPK, Perak together with his men for Bukit Kayu Hitam, Changlun, Kedah. At about 12.30pm on the same day, he and his men, who were divided into four groups, travelling in four cars (ambush cars) arrived at the parking lot of the Immigration Complex, Bukit Kayu Hitam, Changlun and took up ambush positions.

A At about 1.15pm, PW4 saw a blue Honda Accord car (exh P20) bearing a Thai registration No AB426PN ('the Honda Accord') going past the immigration post and stopping at the customs check point for customs inspection. After the inspection, and as the Honda Accord left the customs check point heading towards the direction of Jitra, three of the ambush cars trailed the Honda Accord, while another ambush car was in front of it.

B As soon as the Honda Accord reached the Jitra Toll Plaza and the front ambush car had paid the toll, PW4 together with his men got down from their cars, approached the Honda Accord, and after identifying himself ordered its two occupants to alight therefrom. According to PW4, both the said occupants of the Honda Accord (who were in court identified as the C first and the second accused) appeared to be shocked and frightened. He then inquired from both the accused whether they were conveying any incriminating items. In response, they shook their heads to indicate the negative.

Immediately thereafter, the Honda Accord was examined at the parking D lot of the toll plaza in the presence of both the accused, but nothing incriminating was found. Then, with the aid of a 'T' shaped screwdriver, PW4 took out two screws behind the passenger seat, separated a partition and found, hidden between the back seat and the audio set, some compressed blocks of plant material suspected to be cannabis. The two accused and the Honda Accord were then brought to the Jitra Police Station E ('IPD Jitra') where, in the presence of the accused, PW4 conducted a thorough examination of the Honda Accord. PW4 found and recovered a total of 48 blocks — all of similar compressed plant material — hidden behind the back passenger seat. PW4 then lodged a police report and prepared a search list. Later, at IPD Jitra, both the accused together with all the exhibits and the search list were handed over to the Investigating Officer F Chief Insp Hussein bin Don ('PW8').

Thus the following charge was preferred against both the accused:

> Bahawa kamu bersama-sama pada 23 Jun 1998, jam lebih kurang 1.45pm, di Plaza Tol Jitra, Mukim Jitra, di dalam Daerah Kubang Pasu, di dalam Negeri Kedah, di dalam sebuah kereta pendaftaran Thailand No AB 426 PN sebagai G orang yang tidak dikecualikan di bawah Akta Dadah Berbahaya 1952 (Akta 234) bagi mencapai niat bersama telah didapati di dalam milik kamu berdua dadah jenis cannabis seberat lebih kurang 48 kilogram dengan tujuan untuk mengedar dadah tersebut bagi pihak diri kamu sendiri. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) Pin 1983 dan boleh dihukum dibawah H s 39B(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.
>
> (Trans: That you jointly on 23 June 1998, at the hour of about 1.45pm at the Jitra Toll Plaza, in the Mukim of Jitra, in the District of Kubang Pasu, in the State of Kedah, in a car bearing Thailand registration No AB 426 PN as persons who are not exempted under the Dangerous Drugs Act 1952 I (Act 234) in furtherance of the common intention of you both were found to have in your possession dangerous drugs, to wit, cannabis weighing approximately 48kg with the intention of trafficking in the said drugs on your

own behalf. You have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) (Amend 1983) and shall be punishable under s 39B(2) of the same Act read together with s 34 of the Penal Code).

Besides the evidence of PW4 (the principal witness), the prosecution also led evidence from seven other witnesses and, before closing their case, the prosecution offered 23 witnesses to the defence. At the close of the case for the prosecution, both the accused were acquitted without calling them to enter upon their defence. It was suggested to the court by the learned counsel for the defence, Mr Ranjit Singh and Mr Naran Singh that delivery of a written judgment from this court would be in order considering the complete absence of authorities on the operation of s 37(h) of the Dangerous Drugs Act 1952 ('the Act'), and more particularly the phrase 'found concealed in any compartment, specially, constructed for the purpose.'

It is only necessary for me to deal briefly with the evidence of only two of the prosecution witnesses, namely, Chiew Kiah Han ('PW7') the technical assistant of Kah Motor Co Sdn Bhd, Penang and the investigating officer ('PW8'), the nature of whose evidence became, specifically, the basis of the defence's submission that both the accused should not be called to enter upon their defence.

Only two points were raised by the defence at the close of the prosecution case, to wit:

(i) whether the prosecution could invoke the aid of the presumption under s 37(h) of the Act; and

(ii) whether the identity of the drug exhibits had been proved beyond reasonable doubt.

The first point was raised by the defence as it became clear that bereft of any direct or pointed evidence linking either accused to the drug exhibits, the prosecution's case was untenable unless it succeeded in invoking s 37(h) of the Act — this being the case where the drugs were concealed at the back of the rear passenger seat of P20. PW4 in fact confirmed that the initial examination of the car drew a blank, and it was only upon subsequent detailed examination and after removing the rear seat with the aid of a 'T' shaped screwdriver (exh P2D(1)) did he discover and recover the drug exhibits, all wrapped in plastic sheets which bore no finger prints. Furthermore, PW4 and PW6, who were senior police officers of no mean rank, being a DSP and an ASP respectively, did not at the time of the arrest detect any smell emanating from the interior of the car; and neither were there any traces of cannabis in the passenger compartment of the car.

To fasten guilt onto both the accused persons with the aid of s 37(h) of the Act, the prosecution called PW7 to the stand. In his examination in chief, he gave the following narration. He held a diploma in the automotive field from the Tengku Abdul Rahman ('TAR') College. He was, initially for three years, attached as a mechanic and then for six years, as a technical assistant, in Kah Motor Co Sdn Bhd Penang — the sole distributor of Honda cars. On 27 July 1998, at the request of Chief Insp Hussein, he

examined the said Honda Accord ('P20') at the IPK, Alor Setar and found, at the back portion of the rear seat, a compartment which was not normally found in a new (or original) Honda Accord car of similar model sold and distributed by his company in West Malaysia. He further explained that a new Honda Accord car sold in Malaysia had an 'X' shaped supporting panel behind the rear seat as a normal feature. But this 'X' shaped panel was missing in P20. He, however, confirmed that to gain access to the said rear compartment, the rear seat would first have to be removed with the aid of an instrument such as the 'T' shaped screwdriver (P2D(I)) shown to him.

However, under cross examination by the defence counsel, he said that he was not aware who the distributor of Honda cars in Thailand was; did not know when P20 was purchased or whether it was a reconditioned car or a newly assembled car in Thailand; did not compare P20 with other cars of the same model from Thailand; did not have any experience or knowledge of the back internal configuration of cars of models similar to P20 that were assembled and/or sold in Thailand. And, as his evidence was based only on his knowledge of models similar to P20 sold or assembled in Malaysia, he readily agreed with counsel that the said rear compartment in P20 may not be a specially constructed compartment, as the vehicle's back internal configuration may be representative of the standard features of such cars sold in Thailand.

Standard of proof at the end of the prosecution case

The standard of proof to apply at the close of the prosecution case as encapsulated by the two expressions 'prima facie' and 'beyond reasonable doubt' have been the subject of voluminous judicial exegesis in our courts. Much has been expounded, and so much scholarship and semantics have emanated from recent cases on this trite topic. However, we must defer and yield to the will of Parliament which — in the teeth of *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 and *Arulpragasan Sandaraju v PP* [1997] 1 MLJ 1, 389 — was driven to amend s 180 of the Criminal Procedure Code ('the CPC') (vide s 4 of Act A979) to restate the obvious (before *Khoo Hi Chiang*) in no uncertain terms, namely, that the prima facie standard of proof is applicable at the close of the prosecution case; and that, it would follow, the term 'prima facie' could not and does not mean 'beyond reasonable doubt.' Thus, it may indeed be prudent for our courts to call a moratorium on any further discussions on the subject.

After having for well over nine years past on the High Court Bench, written a substantial number of criminal law judgments for the journals, I am ill-inclined to write anymore, unless provoked inspired or driven. It is high time that I move on to the more useful civil law preoccupations during the constricted time on the Bench that I have left considering my age. Nevertheless, here, I am impelled to put pen on paper to express, with great respect, that I do not subscribe to the views postulated in the following two post Act A979 decisions. We were first confronted with the case of *PP v Mohan Singh Lachman Singh* [1999] 4 CLJ 629, wherein it was opined that:

'Keeping in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a prima facie case'. And, the court went on to decide: 'Considering the prosecution case as a whole, I find that the prosecution has made out, beyond reasonable doubt, a prima facie case under s 180(i) of the CPC and ...'.

This conclusion is untenable, illogical and it makes nonsense of the words 'prima facie' used by the legislature for being treated as dead letter.

When, in order to counter and negate the ratio decidendi in *Khoo Hi Chiang* and *Arulpragasan a/l Sandaraju* , Parliament was driven to amend s 180 of the CPC, surely and clearly the singular purpose of that effort was to contradistinguish, and indeed, to effect patent contradistinction between the words 'prima facie' and 'beyond reasonable doubt', and to forbid the use of the prima facie test at the close of the prosecution stage of the trial. Thus, in holding or implying that 'prima facie' bears the same meaning as 'beyond reasonable doubt,' we would be flying in the face of sharply evident and starkly assertive legislative intention. It does the Bench no good, in terms of our public image, to further pursue or ventilate this issue — not to mention the profound confusion such semantic forays have often caused in the subordinate courts.

Mohan Singh was closely followed by *PP v Sukumaran Sundram* [1999] 4 CLJ 242 which declared that: 'Post Act A979, all judicial enunciations and definitions of 'prima facie case,' basing on the interpretation of the words 'no case against the accused has been made out which, if unrebutted, would warrant his conviction', must be jettisoned'.

It has to be noted that, throughout the very long years of the existence of the phrase 'if unrebutted would warrant a conviction' (in the preamendment s 180 of the CPC), the courts have consistently and invariably held the phrase to mean and postulate a 'prima facie case.' Thus, obviously, a 'prima facie' case, prescribed by the new s 180(i) (as opposed to 'beyond reasonable doubt' under s 182A(i)) of the CPC must mean 'a case which if unrebutted would warrant a conviction.' Clearly, the legislature must have considered it unnecessary or otiose to retain the words 'a case which if unrebutted would warrant a conviction', since this phrase has been repeatedly defined by the courts in a welter of cases, and several authoritative law dictionaries including the *Blacks Law Dictionary* (4th Ed), *Mozley and Whiteley's Law Dictionary* (11th Ed, 1993) and *Wharton's Law Lexicon* (14th Ed, Reprint 1997), as constituting a prima facie case. Hence, with respect I do not subscribe to the view that that phrase could be, or was intended by the legislature to be 'jettisoned.' Indeed, upon closer study, the view taken in *Sukumaran Sundram*, that all post Act A979 decisions based on the words 'no case against the accused has been made out which, if unrebutted, would warrant his conviction, must be jettisoned' is not supported by, and would indeed appear to be inconsistent with the conclusion arrived at, upon facts of that case (see p 262) that: 'There is no sufficient credible prima facie evidence upon which the court can proceed

to find the accused guilty even if he should remain silent' — which boils down to the same familiar hackneyed expression 'evidence which would warrant a conviction ('can proceed to find him guilty') if unrebutted' ('if he should remain silent'). However, I would readily agree with the other view expressed in that case (at p 256) that maximum evaluation of the prosecution evidence at the close of the case for the prosecution 'is anathema to the concept of a prima facie case' (see my discussions in *PP v Ong Cheng Heong* [1998] 6 MLJ 678).

To unravel the standard of proof conundrum, I am inclined to take the view that it is, in the last analysis, essentially merely a sequential question in criminal procedure, which is indeed of critical importance. The decider does not know and indeed, ought not to predict which one of the three options that the accused would take after the defence is called. In all the legal dictionaries, the words 'prima facie evidence' had been defined as constituting evidence which if unrebutted would warrant a conviction. A rhetorical question may be asked: if the decider has found at the end of the prosecution case, and even before the accused is called upon to exercise his option, that a beyond reasonable doubt case (a legal cliche) has been established, what rebuttal or doubt could the accused then raise even if he should decide to take the witness stand? Hence, in my view, if indeed a substantially higher standard of evaluation or a much more vigorous test of credibility is advocated, then a different legal cliche other than 'beyond reasonable doubt' should have been coined. Otherwise, quite apart from derogation from the concept of law for the layman approach, I wonder how could two different dictionaries with differing definitions be used to fathom the meaning of the phrase 'beyond reasonable doubt' at the two stages of the trial? Thus, it is precisely for the above reasons, and it makes good sense that (until *Khoo Hi Chiang*) the court was from time immemorial enjoined to re-evaluate the prima facie evidence on a higher beyond reasonable doubt standard before determining whether he could thereby lawfully convict, even if the accused should opt to remain silent and offer no evidence in his defence.

For clarity, I would prefer to state the law — shorn of its technicalities — on the standard of proof applicable at the close of the prosecution case in cases (as the current case) which fall within the purview of the new amended s 180 of the CPC. In my view the prosecution could be ruled to have 'made out a prima facie case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and — to reiterate — there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance,

this is what Gordon Smith Ag JA held in *PP v Chin Yoke* [1940] MLJ 47. After the defence is called, and if the accused elects to remain silent, calls no evidence, and cannot come up with any good reason why the earlier conclusion was wrong for whatever reason, or pointing out some inherent weaknesses in the prosecution case he may have overlooked earlier, the case will be said to have been proved beyond reasonable doubt. The tentative and mutable nature of prima facie evidence is demonstrated by the trite legal requirement that, where the accused has given a statement from the dock, or evidence on oath, or even should he opt to remain silent (with or without calling witnesses) and the trial is thereby considered as concluded, yet nevertheless, the court (is required)' shall consider all the evidence adduced before it' (now expressly mandated by s 182A(i) of the CPC) before deciding whether the prosecution has proved its case beyond reasonable doubt. And if, in that exercise, the court is satisfied that no reasonable doubt has been raised, the case is said to have been proved beyond reasonable doubt.

Let me at the outset make clear that in the current case this court is applying the prima facie standard of proof enunciated in cases *Pavone v PP* [1984] 1 MLJ 77 and *Kumaraguru a/l N Muniandy & Ors v PP* [1994] 1 MLJ 254, as correctly submitted by the learned DPP. This would mean that in my deliberation to arrive at a decision whether to call the two accused to enter upon their defence, I would essentially have to ask myself whether convincing and credible evidence has been adduced by the prosecution which, if unrebutted, would warrant a conviction — in other words whether, if the defence is called and both accused elect to remain silent and call no witness on their defence, could this court record a conviction? Further, I must in my deliberation, be also conscious and mindful of the trite and settled law, that features of evidence favourable to the accused, including any piece of testimony capable of rebutting any of the presumptions under the Act, could be legitimately gleaned from the very evidence led by the prosecution — since the evidential burden may be discharged by the defence on evidence gathered from the prosecution case. (See *Wong Chooi v PP* [1967] 2 MLJ 180.) I also recognize the principle that it is not open to this court, and indeed it is wholly unsafe and unjust to entertain in its mind the proposition which runs, to wit: 'I am making this ruling (calling the accused to enter on his defence) not because I am satisfied with the case of the prosecution but because I want the accused to explain for himself.' (See *PP v Saimin & Ors* [1971] 2 MLJ at p 16, *PP v Ong Cheng Heong* [1998] 6 MLJ 678 at p 704.)

To determine whether to call the defence, this court must now consider and examine every shred of material evidence led by the Prosecution on the essential ingredients of the offence. And, for clarity and convenience, I propose to take the following approach:

Discovery of the offending exhibits

The prosecution had sought, through PW7, to prove that the drug exhibits were found concealed in a compartment specially constructed for the

purpose in the vehicle, thus triggering the operation of s 37(h) of the Act, whereas, the defence had asserted that the offending exhibits were found concealed but not in 'any compartment specially constructed.' In this regard it must be appreciated that there is a world of difference between 'found concealed in a car' and 'found concealed in a compartment specially constructed for the purpose' in a car. The word 'concealed' means not easily detectable by sight or smell. And, I would hold that the expression 'compartment, specially constructed for the purpose' used in s 37(h) of the Act means a compartment specially constructed and designed for a special purpose of concealment of offending drugs. It would essentially follow that such compartment is either non existent or not of a similar physical feature, design and space when compared with a similar vehicle or means of conveyance that is of the same model. To establish that the compartment was 'specially constructed for the purpose' the prosecution would have to adduce evidence from an expert or a person who is entirely familiar with the car and model of the same make as the subject car sold in the country concerned — which is Thailand in the instant case.

First of all, the competency of PW7 is in serious doubt as he had admitted that he is only familiar with the components and compartments of Honda Accord cars in Malaysia, though he did not say whether this covers a Honda Accord model sold in Malaysia that is similar to the model as represented by P20. Most importantly, he said that he did not know the standard internal structure or configuration of a car such as P20 as it was of Thai origin, and in cross examination he quite frankly conceded that the space in photos exhs P13 and P15 could probably not be a specially constructed compartment. This being so, it is clear that the presumption under s 37(h) of the Act is inapplicable in the instant case for being negated by PW7's own admission.

To counter this the learned DPP had valiantly urged the court to, independently of PW7's evidence, study photographs exhs P13A-C and P15G-H and draw its own conclusion that the offending exhibits were recovered from a concealed compartment specially constructed for the purpose. Presumably, it was suggested that a picture is worth a thousand words — a suggestion more apropos to the realm of fine art rather than the 'rough-N-tumble' (either party would have to take the tumble) art of serious criminal prosecutions — pictures, however dramatic and lucid could only serve as corroborative props to the essential narrative of a witness. In a capital charge, where every essential ingredient, including any aspect or strand of evidence that may trigger the operation of legal presumptions, such as under the Act, has to be proved by direct affirmative evidence, such suggestion by the DPP is as irrelevant as the observation that this case could be a memorable case due to the musical sounding name of the two accused persons — on the same scale as 'Yamaha and Do-re-mi.' It is trite that a judge is no expert and cannot import his own knowledge into the case.

The drugs were concealed at the back of the back passenger seat of P20. SP4 in fact confirmed that his initial examination of the car did not bear fruit and that it was only upon subsequent detailed examination using P2D(1) that was he able to recover the exhibits. PW4 and PW6 being senior

police officers of no mean rank (a DSP and an ASP respectively) did not state that they had detected any smell when they examined the interior of P20, and neither did they notice any traces of cannabis in the passenger compartment therein.

From these two features of the prosecution evidence, this court could draw either of two inferences. This being: (a) the drug exhibits had been concealed by either by the first accused or second accused or both of them in P20, or (b) that, since the drugs were concealed and their presence not being apparent to sight or detectable by smell, neither one of the accused knew of the existence, let alone the fact of their presence during the half hour period that they were seen in P20. As PW8 (the IO) had frankly admitted that no finger prints were lifted, nor any nail clippings or finger swabs taken from the two accused, this court is left with no alternative but to apply trite law that the more favourable of the two inferences should be drawn in favour both of the accused. Granted that there was testimony to the effect that both of the accused look frightened and nervous at the moment of the arrest, but by shaking their heads from left to right when questioned by the arresting officer, they had denied any knowledge of the presence of any incrimination item in P20. Also, they neither tried to escape nor showed any conduct which was untoward from the moment of arrest up to IPD Jitra.

In this connection it is highly important and material to note PW8's (the IO) confirmation that P20 was owned by one Mr Maroning who was, in October 1998, wanted by the Thai Narcotics enforcement officers to assist them in their investigations pertaining to certain dangerous drugs offences. The detail results of inquiries carried out by PW8 though Chief Insp Lau Poh Chay, were as stated in the letter from the Thai officers, produced as exhs P23A and 23B. And, PW8 admitted that after he received the response as in P23A and P23B, no further attempts were made to trace Mr Maroning. Regrettably, there was lacking in any diligent search to procure Mr Maroning or to have his statement recorded. Though details of Mr Maroning's residence and whereabouts in Southern Thailand were set out in P23A, not a single trip was made to Thailand to trace or procure Mr Maroning. Mr Maroning is clearly a 'witness essential to the unfolding of the narrative ...' as in the dicta in *Ti Chuee Hiang v PP*. Considering the fact that there is evidence that the raiding officer had acted on a tip off, undoubtedly by an informer — who might have been a paid informer — it is even more regrettable that the police had not acted with sufficient vigour to trace and procure Mr Maroning. And, if Mr Maroning was in fact located, the prosecution should show to the satisfaction of the court why he could not be procured, considering the principle enunciated in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1, that where police have acted on a tip off the onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility. Obviously, the probability of Mr Maroning having placed the drug exhibits into the said compartment behind the rear seat of P20 has to be ruled out by prosecution evidence, which they have not done.

Re: the exhibits

Identity of the drug exhibits

On 24 June 1998 at 4.05pm, PW8 took the drug exhibits (comprising 48 compressed slabs) out from the strong room for the purpose of putting into a box (exh P1) and sealing exh P1 with 'PDRM 384' seal. And, it was only on 25 June 1998 at 11.40am that PW8 handed P1 with contents to the Government Chemist. The question is when was P1 sealed with PDRM 384? He couldn't have taken 19 hours. Where was it kept during the hiatus of 19 hours, and who had custody of it during the period? This court was left to guess and speculate — adversely to the prosecution case. See *PP v Saw Kok Leong* [1993] 1 CLJ 83 at p 87. A material factor which also compounded the above infirmity, is that PW2 gave the gross weight of the exhibits including the wrappings as 45.316kg, whereas PW8 gave the gross weight with identical wrappings, as 48kg. The difference of 2.684kg was never explained, nor was any attempt made to enlighten the court as to this gross differential in weight; indeed, this weight differential is proportionately similar to the weight differential in *PP v Saat bin Mat Takraw & Anor* [1998] 3 MLJ 784.

Furthermore, the alleged 2" slits on the 48 slabs of drug exhibits mentioned by PW4, PW6 and PW8, was pointedly contradicted by PW2 who said that he did not notice any slits in any of the 48 slabs. And further, when the two photos exhs P12A and P12B were shown to them in cross examination, PW4, PW6 and PW8 could not indicate to the court any trace, or sign, or any semblance of any slit, 2" or otherwise, in any of the 48 slabs, thus throwing into material doubt their credibility on this aspect of the case. These infirmities aforesaid has led this court to habour a serious doubt as whether the exhibits actually seized and the drug subsequently produced before this court were the same.

The learned DPP, in an attempt to counter the above contention by En Ranjit, had argued that since the drug exhibits bore the markings of PW8, and PW2 had said that the seal on P1 was intact when he received same from PW8, it would not matter even if PW8 had not put P1 back into the strong room during the 19 hours gap in the handling of the drug exhibits. To my astonishment, she further went on to request the court to draw an inference that, by virtue of the manner in which she had couched her question on this score, PW8 had taken out the 48 slabs, arranged them and put them in P1 immediately after he took them out. The short answer to this is that in a capital offence case, the court is precluded from drawing any inference, assumption or presumption on anything save as mandated by statute. In view of there being a break of chain of accounted custody of the exhibits as the result of the time hiatus of 19 hours I would hold that this infirmity is also fatal to the prosecution.

Conclusion

Thus, from the evidence led, when considered in its entirety, the net effect of the 'case made out' by the prosecution was merely that: the first accused

was driving P20 on the day and time in question in which the offending drugs exhibits were found in concealed circumstances — concealed, in the sense only that their presence were not apparent to sight or detectable by smell; and, that the second accused was a passenger of the first accused during the time and under the circumstances aforesaid.

The decision

In view of the above infirmities adumbrated, and after considering all the evidence adduced by the prosecution and the submissions by both sides, this court finds that the prosecution has not made out a prima facie case such as would warrant a conviction on the charge should the defence be called and they remain silent and offer no evidence on their behalf. Surely, it is wholly and clearly unsafe for the court to call upon either of the accused to enter upon his defence.

In the event, both the accused are acquitted and discharged.

Both accused acquitted.

Reported by Lim Lee Na